

Exhibit D

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

FIREBIRDS INTERNATIONAL, LLC,
Plaintiff,

vs.

Civil Action No.
3:17-CV-02719-B

FIREBIRD RESTAURANT GROUP, LLC,
FIREBIRD IP, LLC, and MICHAEL D.
KARNS,

Defendants. /

VIDEOTAPED DEPOSITION OF ROBERT A. HUTCHINS

* * * * *

Taken by Defendants
Charlotte, North Carolina
November 19, 2018

* * * * *

Reported by:
TAVI L. FRAGA, RPR
Registered Professional Reporter

Robert A. Hutchins - November 19, 2018

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C O N T E N T S

WITNESS/EXAMINATION

ROBERT A. HUTCHINS

PAGE

By Mr. Illmer

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REPORTER'S NOTE:

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Robert A. Hutchins - November 19, 2018

1 On Monday, November 19, 2018, commencing at
2 9:36 a.m., the videotaped deposition of ROBERT A.
3 HUTCHINS was taken, pursuant to notice and pursuant
4 to the Federal Rules of Civil Procedure, on behalf of
5 the Defendants, at the law offices of Shumaker,
6 Loop & Kendrick, LLP, 101 South Tryon Street,
7 Suite 2200, Charlotte, North Carolina.

8 * * *

9 P R O C E E D I N G S

10 * * *

09:36:00 11 THE VIDEOGRAPHER: And good morning. We
09:36:08 12 are going on the record at 9:36 a.m. Today is
09:36:12 13 Monday, November 19, 2018. This is the beginning
09:36:15 14 of Video Card No. 1. We're here for the deposition
09:36:17 15 of Robert A. Hutchins in the case styled Firebirds
09:36:23 16 International, LLC, v. Firebird Restaurant Group,
09:36:26 17 et al.

09:36:27 18 This deposition is taking place in the law
09:36:29 19 offices of Shumaker, Loop & Kendrick, located at
09:36:34 20 101 South Tryon Street, Charlotte, North Carolina.
09:36:37 21 The court reporter is Tavi Fraga. We're with
09:36:39 22 Dickman Davenport, 4228 North Central Expressway,
09:36:44 23 Suite 101, Dallas, Texas 75206.

09:36:47 24 Would counsel and all those present please
09:36:49 25 state your appearances for the record.

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09:36:53 1 MR. ILLMER: Richard Illmer and Dustin
09:36:56 2 Taylor on behalf of the defendants.

09:36:58 3 MR. ADAMS: Thad Adams on behalf of the
09:37:02 4 plaintiff.

09:37:05 5 THE VIDEOGRAPHER: Thank you. Madam court
6 reporter.

7 THE COURT REPORTER: Please raise your
8 right hand. Do you solemnly swear or affirm under
9 the penalties of perjury to tell the truth, the
10 whole truth, and nothing but the truth?

11 THE WITNESS: I do.

12 THE COURT REPORTER: Thank you.

13 - - -

14 Whereupon, ROBERT A. HUTCHINS, having been
15 first duly sworn, was examined and testified as
16 follows:

17 EXAMINATION

18 BY MR. ILLMER:

09:37:17 19 Q. Good morning. This is Rick Illmer. I represent the
09:37:21 20 defendants. Can you hear me okay, Mr. Hutchins?

09:37:23 21 A. I can, yes.

09:37:23 22 Q. All right. So I'm going to take your deposition this
09:37:27 23 morning. You understand that the interests of my
09:37:30 24 clients are adverse to those of the plaintiff?

09:37:34 25 A. That's my understanding.

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11:13:38 1 negotiation, FRG would rather have a more limited use
11:13:42 2 in order to get a lower rate, and it would just take
11:13:44 3 them one state a time as a group?

11:13:59 4 THE WITNESS: The court reporter couldn't
11:13:59 5 understand your question.

11:13:59 6 MR. ADAMS: I didn't either.

11:13:59 7 MR. ILLMER: That's okay. I'll try again.

11:13:59 8 THE WITNESS: Sorry. I think I did,
11:14:03 9 but...

11:14:03 10 BY MR. ILLMER:

11:14:04 11 Q. Well, it's possible that FRG might not have desired
11:14:10 12 to negotiate a nationwide royalty at the time, right?

11:14:14 13 A. That's a possibility, but, again, it's a two-party
11:14:16 14 negotiation. And I specifically considered that in
11:14:20 15 my assessment of that issue.

11:14:25 16 Q. The more limited the rights, the lower the royalty
11:14:28 17 would be?

11:14:28 18 A. In general, yes.

11:14:29 19 Q. The more limited the use, the lower the royalty would
11:14:33 20 be?

11:14:33 21 A. Generally that's correct.

11:14:36 22 Q. And so far, of what you know of the facts in this
11:14:46 23 case, FRG does not use the Firebirds name or mark in
11:14:51 24 advertising for Village Burger Bar?

11:14:52 25 A. Well, I understand that all of the individual brands

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11:15:02 1 are directly promoted on FRG's website. There are
11:15:09 2 direct links to the individual brands on FRG's
11:15:12 3 website, so -- and I understand the plaintiffs
11:15:14 4 consider that to be an infringing act, as well as I
11:15:18 5 understand, too, that the 5K run, all the individual
11:15:22 6 brands were promoted under the FRG umbrella, and I
11:15:26 7 understand the plaintiffs consider that also to be
11:15:28 8 infringing acts.

11:15:29 9 Q. Okay.

11:15:30 10 MR. ILLMER: I'll object to the
11:15:32 11 nonresponsiveness and move to strike. But let's
11:15:34 12 take each of those.

11:15:34 13 BY MR. ILLMER:

11:15:35 14 Q. So if -- under your hypothetical 2 percent royalty,
11:15:38 15 you didn't limit it to just FRG using it in the way
11:15:42 16 it's been used now, correct?

11:15:43 17 A. Can you say that again?

11:15:49 18 Q. Yeah. Under your hypothetical where you came up with
11:15:53 19 the 2 percent reasonable royalty rate, the use was
11:15:57 20 not restricted to the same uses that FRG has made of
11:16:01 21 the mark, if any, in the past?

11:16:03 22 A. This, again, that -- I don't. This is an ex ante
11:16:14 23 analysis done prior to the infringement occurring, so
11:16:16 24 in this royalty analysis, they would have the freedom
11:16:19 25 to operate and the freedom to use the mark as they

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11:16:22 1 saw fit. So what actually happened isn't necessarily
11:16:24 2 relevant to the hypothetical negotiation.
11:16:27 3 Q. Well, then why did you bring up what FRG has -- what
11:16:31 4 use it's made of the mark in the past?
11:16:33 5 A. I was responding to your question about Village Bar
11:16:39 6 not using the mark.
11:16:40 7 Q. Okay. Well, let me try it a different way.
11:16:42 8 Your royalty rate assumes that FRG is going
11:16:46 9 to use the Firebird mark advertising for each brand
11:16:50 10 subsidiary, correct?
11:16:55 11 A. It doesn't make that direct assumption. It assumes
11:16:57 12 that FRG will take a license to the mark, and they
11:17:00 13 can use it as they see fit.
11:17:01 14 Q. And that would include using it to advertise each of
11:17:07 15 the brand subsidiaries?
11:17:08 16 A. It could.
11:17:08 17 Q. So under your 2 percent royalty, FRG would have a lot
11:17:17 18 more broader use of the mark than what it has at
11:17:20 19 least done in the past, if anything?
11:17:22 20 A. They could, yes. They would have the freedom to
11:17:29 21 operate and freedom to use the mark as they saw fit
11:17:32 22 for their best purposes.
11:17:34 23 Q. If F -- if FR -- if the use was to be limited to the
11:17:37 24 same uses that FRG made of the mark in the past, how
11:17:42 25 much lower would the royalty rate need to be?

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11:17:44 1 A. Again, that's a factor I took into consideration, as
11:17:48 2 discussed in my opening report. And I -- it did
11:17:52 3 result in a lower royalty rate, a reduction to the
11:17:55 4 rate itself. So it's something I considered and
11:18:00 5 deducted or took into account in my royalty rate
11:18:02 6 analysis.

11:18:02 7 MR. ILLMER: I'm going to object as
11:18:04 8 nonresponsive because I don't think you answered my
11:18:07 9 question. And, again, not meant to be
11:18:09 10 disrespectful in any way.

11:18:11 11 BY MR. ILLMER:

11:18:11 12 Q. If the hypothetical royalty that you're opining about
11:18:14 13 had a use that was limited -- not as broad as what
11:18:19 14 you assumed, but limited to the same use that FRG had
11:18:23 15 made of this mark in the past, how much less would
11:18:27 16 the royalty need to be for it to be reasonable?

11:18:31 17 A. Again, I took that into account in my analysis and
11:18:34 18 the -- and I already made that adjustment.

11:18:36 19 Q. But you already told me the 2 percent royalty would
11:18:42 20 allow FRG to use the mark as it sees fit all across
11:18:47 21 the country, right?

11:18:48 22 A. That's correct.

11:18:48 23 Q. So if FRG's use under this royalty were to be more
11:18:55 24 limited only in Texas and Oklahoma and only for the
11:18:58 25 same things it's done in the past, if anything, how

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11:19:00 1 much less than 2 percent would it be?

11:19:01 2 A. It wouldn't be any less, as I discussed in my report.

11:19:04 3 Q. So the royalty to use the mark for all time all

11:19:09 4 across the country would be the same as to use it

11:19:12 5 only in Texas on the FRG website and for the 5K run?

11:19:19 6 A. Yes. Again, because that -- I took that specific

11:19:23 7 issue into account in settling upon my royalty rate,

11:19:26 8 so it's already --

11:19:26 9 Q. How did you --

11:19:27 10 A. -- factored in.

11:19:27 11 Q. How did you take it into account?

11:19:29 12 A. Well, it's described in detail in my report, but in

11:19:34 13 general, it was one of the bases for my opinion that

11:19:37 14 the royalty rate negotiations would start at the

11:19:42 15 bottom of the range of rates that I had identified as

11:19:44 16 comparable.

11:19:45 17 Q. And taking all that into consideration, you came up

11:19:56 18 with a rate that was 2 percent to use the mark as FRG

11:20:02 19 sees fit all across the nation, right?

11:20:05 20 A. Yes.

11:20:05 21 Q. All right. And I'm saying if we take that use and

11:20:11 22 restrict it further, if we say FRG cannot use it all

11:20:15 23 across the nation, it can only use it in Oklahoma and

11:20:17 24 Texas, how much less would the -- than 2 percent

11:20:19 25 would it be?

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11:20:20 1 A. It would still be 2 percent.

11:20:25 2 Q. Why would it be the same rate for a more limited use?

11:20:28 3 A. Well, again, because that 2 percent already takes

11:20:35 4 that into account.

11:20:35 5 Q. Any other reason?

11:20:41 6 A. Well, it's discussed -- the reasons -- how I settled

11:20:47 7 upon my rate are discussed in detail in my report,

11:20:50 8 and that's one of the issues that I -- that I

11:20:52 9 considered and evaluated, as long -- along with the

11:20:57 10 non-infringing alternatives.

11:20:59 11 Q. I want to make certain I understand your testimony.

11:21:02 12 A royalty for a more limited use is not worth as much

11:21:05 13 as a royalty for a broader use, correct?

11:21:08 14 A. Generally that's correct.

11:21:09 15 Q. And when you did your analysis in this case, after

11:21:14 16 taking into account all of the factors that you

11:21:18 17 considered, you came up with a 2 percent royalty to

11:21:22 18 use the mark across the whole country?

11:21:24 19 A. Correct. That would be the -- one of the terms of

11:21:29 20 the license.

11:21:29 21 Q. All right. So if the mark had a more limited use, if

11:21:36 22 it could not be used across the whole country, the

11:21:38 23 royalty would generally be less, correct?

11:21:43 24 A. Generally that's correct. But, again, that's what I

11:21:45 25 took into account in settling on the bottom of the

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11:21:48 1 lower rate in my range as a starting point for
11:21:51 2 negotiations. So the premise --

11:21:53 3 Q. But even after you took all of that into account, you
11:21:57 4 came up with an opinion that to use it across the
11:22:00 5 whole country, 2 percent would be the right rate,
11:22:00 6 correct?

11:22:03 7 A. Yes.

11:22:03 8 Q. And I'm saying if you now take your analysis and
11:22:08 9 reduce it further to say they're not going to be able
11:22:10 10 to use it across the whole country, it would then be
11:22:13 11 less than 2 percent, right?

11:22:15 12 A. I would -- I would disagree.

11:22:16 13 Q. Why?

11:22:20 14 A. Well, again, it's discussed in detail in my report,
11:22:24 15 but that factor, that issue has been taken into
11:22:27 16 account as part of the willing party negotiation
11:22:30 17 construct of the hypothetical negotiation. So it's
11:22:34 18 not just one party's, you know, views as to what the
11:22:37 19 appropriate territory should be. You have to
11:22:39 20 consider both parties' perspectives.

11:22:42 21 Q. So is it your opinion that FRG simply wouldn't agree
11:22:51 22 to a lower amount for a lower or a more restricted
11:22:55 23 use?

11:22:55 24 A. That FRG would not agree to it?

11:23:00 25 Q. Pardon me. That the plaintiff would not agree. I

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11:23:03 1

misspoke.

11:23:03 2

A. I think the parties would ultimately conclude that

11:23:07 3

the best way going forward would to be -- have an

11:23:12 4

agreement that did not limit or have territory

11:23:14 5

restrictions in it.

11:23:15 6

Q. And what is the factual basis for that conclusion?

11:23:20 7

A. Again, it's discussed in my report, but in general,

11:23:26 8

it's so that the parties will not have to continue to

11:23:29 9

come back to the negotiating table every time either

11:23:34 10

party wanted to expand into a new state. It also

11:23:37 11

allowed the plaintiff -- I'm sorry -- the defendant,

11:23:41 12

the licensee, the maximum freedom to operate.

11:23:45 13

Q. Anything else?

11:23:46 14

A. I would say, too, it prevents the -- prevents the --

11:23:53 15

what they call the hold-up issue, whereas if you have

11:23:55 16

to go back and negotiate a new rate every time you

11:23:58 17

enter a state, to the extent that the licensee is

11:24:02 18

expanding and growing, that creates a potential for

11:24:05 19

the licensor to try and extract a higher royalty rate

11:24:09 20

from them because they know they need that license in

11:24:11 21

order to -- in order to not be infringing the mark

11:24:15 22

under the hypothetical negotiation construct.

11:24:17 23

Q. Anything else?

11:24:18 24

A. I think that's probably generally -- generally the

11:24:23 25

main reasons or main bases.